

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Case No. 2:15-CV-08733 (VEB)

ERIC JON TETRAULT,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

In August of 2012, Plaintiff Eric Jon Tetrault applied for Disability Insurance Benefits under the Social Security Act. The Commissioner of Social Security denied the application.¹ Plaintiff, represented by Suzanne C. Leidner, Esq., commenced this

¹ On January 23, 2017, Nancy Berryhill took office as Acting Social Security Commissioner. The Clerk of the Court is directed to substitute Acting Commissioner Berryhill as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

1 action seeking judicial review of the Commissioner’s denial of benefits pursuant to
2 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

3 The parties consented to the jurisdiction of a United States Magistrate Judge.
4 (Docket No. 11, 12, 34). On May 12, 2017, this case was referred to the undersigned
5 pursuant to General Order 05-07. (Docket No. 33).

7 **II. BACKGROUND**

8 Plaintiff applied for benefits on August 5, 2012, alleging disability beginning
9 August 2, 1995. (T at 122-28).² The application was denied initially and on
10 reconsideration. Plaintiff requested a hearing before an Administrative Law Judge
11 (“ALJ”). On September 18, 2013, a hearing was held before ALJ James Goodman.
12 (T at 1195). Plaintiff appeared without an attorney and was granted an adjournment.
13 (T at 1203). A second hearing was held on April 9, 2014. (T at 1152). Plaintiff
14 appeared with an attorney and testified. (T at 1160-1189).

15 On May 20, 2014, the ALJ issued a written decision denying the application
16 for benefits. (T at 12-22). The ALJ’s decision became the Commissioner’s final
17 decision on September 17, 2015, when the Appeals Council denied Plaintiff’s
18 request for review. (T at 2-4).

19 ² Citations to (“T”) refer to the administrative record at Docket No. 16.

1 On November 9, 2015, Plaintiff, acting by and through his counsel, filed this
2 action seeking judicial review of the Commissioner’s decision. (Docket No. 1). The
3 Commissioner interposed an Answer on May 11, 2016. (Docket No. 16). The
4 parties filed a Joint Stipulation on May 9, 2017. (Docket No. 32).

5 After reviewing the pleadings, Joint Stipulation, and administrative record,
6 this Court finds that the Commissioner’s decision should be affirmed and this case
7 must be dismissed.

8 9 **III. DISCUSSION**

10 **A. Sequential Evaluation Process**

11 The Social Security Act (“the Act”) defines disability as the “inability to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which has
14 lasted or can be expected to last for a continuous period of not less than twelve
15 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
16 claimant shall be determined to be under a disability only if any impairments are of
17 such severity that he or she is not only unable to do previous work but cannot,
18 considering his or her age, education and work experiences, engage in any other
19 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),

1 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
2 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process
4 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
5 one determines if the person is engaged in substantial gainful activities. If so,
6 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
7 decision maker proceeds to step two, which determines whether the claimant has a
8 medically severe impairment or combination of impairments. 20 C.F.R. §§
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

10 If the claimant does not have a severe impairment or combination of
11 impairments, the disability claim is denied. If the impairment is severe, the
12 evaluation proceeds to the third step, which compares the claimant's impairment(s)
13 with a number of listed impairments acknowledged by the Commissioner to be so
14 severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii),
15 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or
16 equals one of the listed impairments, the claimant is conclusively presumed to be
17 disabled. If the impairment is not one conclusively presumed to be disabling, the
18 evaluation proceeds to the fourth step, which determines whether the impairment
19 prevents the claimant from performing work which was performed in the past. If the

1 claimant is able to perform previous work, he or she is deemed not disabled. 20
2 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual
3 functional capacity (RFC) is considered. If the claimant cannot perform past relevant
4 work, the fifth and final step in the process determines whether he or she is able to
5 perform other work in the national economy in view of his or her residual functional
6 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
7 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

8 The initial burden of proof rests upon the claimant to establish a *prima facie*
9 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
10 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
11 is met once the claimant establishes that a mental or physical impairment prevents
12 the performance of previous work. The burden then shifts, at step five, to the
13 Commissioner to show that (1) plaintiff can perform other substantial gainful
14 activity and (2) a "significant number of jobs exist in the national economy" that the
15 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

16 **B. Standard of Review**

17 Congress has provided a limited scope of judicial review of a Commissioner's
18 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision,
19 made through an ALJ, when the determination is not based on legal error and is

1 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
2 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

3 “The [Commissioner’s] determination that a plaintiff is not disabled will be
4 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
5 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial
6 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
7 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
8 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence as a
9 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
10 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and
11 conclusions as the [Commissioner] may reasonably draw from the evidence” will
12 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review,
13 the Court considers the record as a whole, not just the evidence supporting the
14 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
15 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

16 It is the role of the Commissioner, not this Court, to resolve conflicts in
17 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
18 interpretation, the Court may not substitute its judgment for that of the
19 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th

1 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
2 set aside if the proper legal standards were not applied in weighing the evidence and
3 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
4 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
5 administrative findings, or if there is conflicting evidence that will support a finding
6 of either disability or non-disability, the finding of the Commissioner is conclusive.
7 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

8 **C. Commissioner's Decision**

9 The ALJ determined that Plaintiff last met the insured status requirements of
10 the Social Security Act on December 31, 1999 (the “date last insured”). The ALJ
11 noted that Plaintiff engaged substantial gainful activity between August 2, 1995 (the
12 alleged onset date) and May 30, 1997. (T at 15-16).

13 The ALJ found that Plaintiff was barred from claiming he became disabled
14 prior to March 1, 2005, because that was the date of disability established by the
15 Commissioner in a prior application for benefits filed by Plaintiff. (T at 16).

16 However, out of an abundance of caution, the ALJ continued the sequential
17 evaluation process. The ALJ found that Plaintiff had the following medically
18 determinable impairments prior to the date last insured: scapholunate laxity with
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1 scapholunate diastasis³ of the right wrist; mild disc degeneration/annular bulge of the
2 lumbar spine with mild scattered and lower thoracic lower lumbar Schmorl's nodes⁴,
3 chronic lumbosacral strain, and right shoulder strain. (T at 16-17). The ALJ
4 concluded that these impairments, in combination, were "severe" within the meaning
5 of the Social Security Act. (T at 16-17).

6 However, the ALJ concluded that, as of the date last insured, Plaintiff did not
7 have an impairment or combination of impairments that met or medically equaled
8 one of the impairments set forth in the Listings. (T at 17).

9 The ALJ determined that, as of the date last insured, Plaintiff retained the
10 residual functional capacity ("RFC") to perform light work as defined in 20 CFR §
11 416.967 (b), except that he was limited to frequent (but not constant) manipulative
12 activities bilaterally (e.g. reaching, handling, fingering, and feeling). (T at 17).

13 ³ "Scapholunate diastasis is the term used to describe an abnormal increase in the scapholunate interval. Scapholunate
14 diastasis occurs when there is a functionally complete tear of the scapholunate ligament. Scapholunate diastasis can be
15 seen in the setting of scapholunate dissociation. Scapholunate dissociation is the loss of synchronous motion or
16 normal alignment between the scaphoid and lunate bones usually from ligamentous injury. The mechanism of injury in
17 scapholunate dissociation is most commonly trauma causing wrist extension, ulnar deviation and intercarpal
18 supination. Eventually scapholunate dissociation leads to misalignment of other scaphoid joints and ultimately to
19 osteoarthritis." <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4141341/>.

20 ⁴ "An upward and downward protrusion (pushing into) of a spinal disk's soft tissue into the bony tissue of the adjacent
vertebrae. Schmorl's nodes, which are common, especially with minor degeneration of the aging spine, are detectable
via X-ray as spine abnormalities."
<https://www.google.com/search?client=safari&rls=en&q=Schmorl%27s+nodes&ie=UTF-8&oe=UTF-8>

1 The ALJ found that, as of the date last insured, Plaintiff could perform his
2 relevant work as a prop maker and screen writer. (T at 21).

3 As such, the ALJ found that Plaintiff was not entitled to benefits under the
4 Social Security Act from August 2, 1995 (the alleged onset date) through December
5 31, 1999 (the date last insured). (T at 21-22). As noted above, the ALJ's decision
6 became the Commissioner's final decision when the Appeals Council denied
7 Plaintiff's request for review. (T at 2-4).

8 **D. Disputed Issues**

9 As set forth in the parties' Joint Stipulation (Docket No. 32), Plaintiff offers
10 three (3) main arguments in support of his claim that the Commissioner's decision
11 should be reversed. First, he contends that the ALJ improperly applied res
12 judicata/collateral estoppel to bar his claim for disability insurance benefits. Second,
13 Plaintiff asserts that the ALJ did not properly assess the relevant medical evidence.
14 Third, he challenges the ALJ's credibility determination. This Court will address
15 each argument in turn.

IV. ANALYSIS

A. Res Judicata/Estoppel

In 2005, Plaintiff applied for disability insurance benefits and supplemental security income (“SSI”) benefits. In December of 2005, the Commissioner approved the claim for SSI benefits, but determined that Plaintiff was not eligible for disability insurance benefits. (T at 26, 256, 93-100, 1155). Although the administrative history is rather convoluted, there appears to be no dispute that Plaintiff, who was proceeding *pro se*, did not appeal from the 2005 denial of disability insurance benefits. There is likewise no dispute that the instant application for disability insurance benefits, which was filed in 2012, seeks benefits for the same period of time as the application denied in 2005. As noted above, the ALJ declined to re-open the previous application for benefits and found that the prior denial of disability insurance benefits (which became final due to Plaintiff’s failure to seek review) barred reconsideration of the claim. (T at 16).

This Court lacks the jurisdiction to review this aspect of the ALJ’s decision. The Commissioner has the discretion to apply res judicata and decline to reconsider a prior application. The exercise of that discretion is generally not subject to judicial review. *See Krumpelman v. Heckler*, 767 F.2d 586, 588 (9th Cir. 1985).

1 Although the Ninth Circuit has recognized various exceptions to this general
2 rule, none of those exceptions are applicable here.

3 First, judicial review is permitted on the question of whether the claim at bar
4 is the same as the claim previously denied. *See id.* Here, there is no question that
5 both claims allege disability during the same time period and for the same disability.

6 Second, the Commissioner may “open the door” to judicial review by re-
7 opening the prior claim and considering its merits, in which case the merits
8 determination would be subject to review. *Id.* at 589. Here, while the ALJ did
9 address the merits of the claim out of an abundance of caution, the ALJ expressly
10 denied the claim on estoppel/res judicata grounds. (T at 16). As such, the decision is
11 not reviewable on this basis. *Id.*; *see also McGowan v. Harris*, 666 F.2d 60, 67-68
12 (4th Cir. 1981)(holding that “inquiry in to the nature of the evidence should not be
13 read as reopening of [the] claim on the merits” where it was “followed by a specific
14 conclusion that the claim should be denied on res judicata grounds”).

15 Lastly, the Commissioner’s application of res judicata is reviewable where the
16 claimant states a colorable constitutional claim. *See Lester v. Chater*, 81 F.3d 821,
17 827 (9th Cir. 1995). Here, Plaintiff has not stated such a claim. *See id.*; *see also*
18 *McDonald v. Barnhart*, No. C 01-03738, 2002 U.S. Dist. LEXIS 22584, at *8-11
19 (N.D. Cal. Nov. 19, 2002).

1 Accordingly, Plaintiff has not established facts or constitutional claims
2 sufficient to confer subject matter jurisdiction upon this Court to review the
3 Commissioner's discretionary decision to impose res judicata and decline to re-open
4 the prior denial of disability insurance benefits. This action must be dismissed on
5 that basis.

6 **B. Medical Evidence**

7 For the reasons set forth above, this Court finds that it lacks jurisdiction to
8 review the ALJ's denial of benefits, because that denial was based upon the
9 discretionary application of res judicata. With that said, this Court is mindful that
10 Plaintiff acted *pro se* with regard to the prior claim for disability insurance benefits.
11 In addition, the administrative record with regard the consideration of that prior
12 claim can be described (charitably) as rather muddled. Accordingly, out of an
13 abundance of caution, this Court will address Plaintiff's substantive arguments. For
14 the following reasons, this Court finds the ALJ's consideration of the merits of the
15 claim supported by substantial evidence and consistent with applicable law. As
16 such, even if there was some arguable issue with the Commissioner's application of
17 res judicata, the decision to deny benefits would nevertheless still be sustained.

1 Plaintiff alleged disability beginning August 2, 1995 (T at 122) and met the
2 insured status requirements under the Act through December 31, 1999. (T at 15-22).
3 This comprises the relevant time period under review.

4 There appears to be no dispute that the ALJ properly concluded that,
5 notwithstanding the alleged disability onset date of August 2, 1995, Plaintiff worked
6 at Disneyland though at least May 30, 1997. (T at 15-16, 114, 262). This work
7 constituted substantial gainful activity and Plaintiff is thus not entitled to benefits
8 with respect to this period of time. (T at 15-16); *see* 20 CFR § 404.1520 (b) (“If you
9 are working and the work you are doing is substantial gainful activity, we will find
10 that you are not disabled regardless of your medical condition or your age,
11 education, and work experience.”).

12 In addition, the ALJ performed a thorough review of the medical record from
13 the relevant time period and offered a cogent explanation in support of his decision.
14 For example, in August of 1995, Dr. Aiden Clarke, a treating physician, noted that
15 Plaintiff “had an extremely mild sprain of his neck and possibly low back.” (T at
16 825). Dr. Clarke believed there was “exaggeration of symptoms” and assessed no
17 functional limitations. (T at 825). In October of 1995, Dr. Clark again found no
18 limitations and described Plaintiff’s subjective complaints as “not objectively
19 supportable.” (T at 830-31, 845). In February of 1996, Dr. Charles Lane, another
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1 treating physician, recommended that Plaintiff wear a wrist support, but otherwise
2 assessed no functional limitations. (T at 918-21).

3 In September of 1996, Dr. Lane described Plaintiff as “working in an
4 unrestricted manner.” (T at 596). In January of 1999, Dr. Lane opined that a return
5 to work by Plaintiff would likely cause an increase in his symptomatology, but
6 concluded that he would cause no permanent damage by doing so. (T at 601).
7 Records generated by Dr. Jon Greenfield, a treating orthopedic surgeon, in 1996,
8 1997, and 1998 were generally unremarkable, with Plaintiff described capable of
9 “light duty” work, being attended with conservative treatment, and with limitations
10 only as to heavy lifting with the right arm. (T at 863-99).

11 Plaintiff argues that the ALJ should have weighed the evidence differently and
12 offers a rather disjointed summary of third party and other evidence tending to show
13 suggestions of disability during the relevant time period. However, it is the role of
14 the Commissioner, not this Court, to resolve conflicts in evidence. *Magallanes v.*
15 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); *Richardson*, 402 U.S. at 400. If the
16 evidence supports more than one rational interpretation, this Court may not
17 substitute its judgment for that of the Commissioner. *Allen v. Heckler*, 749 F.2d 577,
18 579 (9th 1984). If there is substantial evidence to support the administrative
19 findings, or if there is conflicting evidence that will support a finding of either

1 disability or nondisability, the Commissioner's finding is conclusive. *Sprague v.*
2 *Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

3 Here, the ALJ's decision was supported by substantial evidence and must
4 therefore be sustained. *See Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.
5 1999)(holding that if evidence reasonably supports the Commissioner's decision, the
6 reviewing court must uphold the decision and may not substitute its own judgment).

7 **C. Credibility**

8 A claimant's subjective complaints concerning his or her limitations are an
9 important part of a disability claim. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
10 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ's findings with regard to the
11 claimant's credibility must be supported by specific cogent reasons. *Rashad v.*
12 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of
13 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear
14 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
15 findings are insufficient: rather the ALJ must identify what testimony is not credible
16 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
17 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

18 However, subjective symptomatology by itself cannot be the basis for a
19 finding of disability. A claimant must present medical evidence or findings that the

1 existence of an underlying condition could reasonably be expected to produce the
2 symptomatology alleged. See 42 U.S.C. §§423(d)(5)(A), 1382c (a)(3)(A); 20 C.F.R.
3 § 404.1529(b), 416.929; SSR 96-7p.

4 In this case, Plaintiff testified as follows:

5 During the relevant time period, he experienced sharp pain behind the right
6 shoulder blade, right wrist pain, and low back pain. (T at 1162). Psychologically, he
7 was frustrated because of his inability to work. (T at 1163). Pain caused
8 interpersonal problems and difficulty concentrating. (T at 1163, 1171). Following
9 an accident in 1992, he had difficulty lifting objects. (T at 1166). He was employed
10 after 1999 in various occupations, but lost the jobs because of his limitations. (T at
11 1169, 1187-90). Sitting longer than 10 minutes is difficult. (T at 1171). He was not
12 able to use his right upper extremity to do the types of work he had performed prior
13 to his disability. (T at 1175). He was treated with physical therapy, occupational
14 therapy, and chiropractic care during the relevant time period. (T at 1179, 1181).

15 The ALJ concluded that Plaintiff's medically determinable impairments could
16 reasonably be expected to cause the alleged symptoms, but that his statements
17 concerning the intensity, persistence, and limiting effects of the symptoms were not
18 fully credible. (T at 20).

1 This Court finds that the ALJ’s credibility determination was supported by
2 substantial evidence and consistent with applicable law. First, the ALJ reasonably
3 concluded that Plaintiff’s testimony was contradicted by the objective medical
4 evidence. (T at 20). As discussed above, the records from the relevant time period
5 document treatment for numerous medical issues, but generally contained few
6 objective findings of significant limitations. (T at 825, 830-31, 867-70, 891-92, 918-
7 22, 946). Although lack of supporting medical evidence cannot form the sole basis
8 for discounting pain testimony, it is a factor the ALJ may consider when analyzing
9 credibility. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). In other words, an
10 ALJ may properly discount subjective complaints where, as here, they are
11 contradicted by medical records. *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d
12 1155, 1161 (9th Cir. 2008); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.
13 2002).

14 Second, the ALJ noted that Plaintiff engaged in substantial gainful activity for
15 extended periods after the date he claims he was disabled. (T at 20). This was a
16 valid basis for discounting his credibility. *See Fair v. Bowen*, 885 F.2d 597, 604 n. 5
17 (9th Cir. 1989)(noting that ALJ may rely on “ordinary techniques of credibility
18 evaluation” and discount a claimant’s credibility if he or she “has made prior
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1 statements inconsistent” with subjective complaints or “is found to have been less
2 than candid in other aspects of his [or her] testimony”).

3 Lastly, Dr. Clarke, one of Plaintiff’s treating physicians, opined there was
4 “exaggeration of symptoms” and described Plaintiff’s subjective complaints as “not
5 objectively supportable.” (T at 825, 830-31, 845).

6 In light of the above, this Court finds that the ALJ’s credibility determination
7 must be sustained. *See Morgan v. Commissioner*, 169 F.3d 595, 599 (9th Cir.
8 1999)(“[Q]uestions of credibility and resolutions of conflicts in the testimony are
9 functions solely of the [Commissioner].”).

10 11 **V. ORDERS**

12 IT IS THEREFORE ORDERED that:

13 Judgment be entered AFFIRMING the Commissioner’s decision; and

14 The Clerk of the Court shall file this Decision and Order, serve copies upon
15 counsel for the parties, and CLOSE this case.

16 DATED this 14th day of February 2018,

17 /s/Victor E. Bianchini
18 VICTOR E. BIANCHINI
19 UNITED STATES MAGISTRATE JUDGE
20